Office-Supreme Court, U.S.
FILED
JUL 24 1981
ALEXANDER L. STEVAS,
CLERK

NO. 80-2216

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1980

JOHN W. JONES,

Petitioner,

VS.

R. L. FAWCETT AND WIFE, MILDRED FAWCETT, BUNN F. FAWCETT AND WIFE, JANICE FAWCETT,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE ARKANSAS COURT OF APPEALS

JOHN C. FINLEY, JR.
Counsel of Record
JOHN C. FINLEY III

FINLEY & FINLEY
Attorneys at Law
20 E. Main St.
Ashdown, Arkansas 71822
Telephone (501) 898-3147

Attorneys for Respondents

QUESTIONS PRESENTED FOR REVIEW

I. Whether the Trial Chancellor's denial of Petitioner's Motion for Continuance of trial, due to the absence of Plaintiff, Mary Rogers Wilson, constituted a denial of due Process under the Fifth and Fourteenth Amendments to the United States Constitution.

II. Whether the Trial Chancellor's refusal to disqualify himself upon Petitioner's Motion for bias, prejudice, and the appearance of impropriety, constituted a denial of due Process under the Fifth and Fourteenth Amendments to the United States Constitution.

III. Whether the Trial Chancellor's denial of Petitioner's Motion to file an amended Complaint was based on 42 U.S.C. 1985(3) and his request to call witnesses in support thereof, constituted a denial of due Process under the Fifth and Fourteenth Amendments to the United States Constitution.

LIST OF ALL PARTIES

The Original Plaintiffs in this Action, filed on July 25, 1975, were listed as Otbie Jetton, Lula Bowles Talton and Mary Rogers. The above assigned their Rights to Petitioner, John W. Jones, on May 22, 1976. Filed for record June 24, 1976. (R. 411) (P's Exhibit No. 3.)

The Trial Chancellor in a hearing on June 29, 1977 in Little River County, Arkansas Chancery Court, held that Mary Rogers Wilson, had never authorized her signature to the Complaint, and hence did not award a default judgment against her on her alleged one-half lifetime

interest, in 160 acres of land in Little River County, Arkansas.

The Defendants in said action, the Respondents here are: R. L. Fawcett and Mildred Fawcett, his wife; and Bunn F. (B. F.) Fawcett and Janice Fawcett, his wife.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

LIST OF ALL PARTIES i

THE OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR NOT GRANTING THE WRIT — ARGUMENT 3

I.

The Trial Chancellor's denial of Petitioner's Motion for Continuance of Trial due to the absence of Plaintiff, Mary Rogers Wilson did not constitute a denial of due Process under the Fifth and Fourteenth Amendments to the United States Constitution and therefore was properly decided by the Arkansas Court of Appeals. 3

II.

The Trial Chancellor's refusal to disqualify himself upon Petitioner's Motion for bias, prejudice, and the appearance of impropriety, did not constitute a denial of due Process under the Fifth and Fourteenth Amendments to the United States Constitution. 7

Page

III.

The Trial Chancellor's Denial of Petitioner's Motion to file an Amended Complaint based on 42 U.S.C., 1985(3) and his denial of a Request to call Witnesses in Support thereof did not constitute a denial of due process under the Fifth and Fourteenth Amendments to the Constitution. ... 17

CONCLUSION 24

TABLES OF AUTHORITIES CITED

Cases

Page

Barry v. Sigler, C.A. Neb. 373 F.2d 835 (1967) 12

Bass v. Minich, 194 Ark. 589 (1937) 7

Braswell v. Gehl, 263 Ark. 706, 567 S.W.2d 113 (1978) ... 13

Connell v. Steel Haulers, Inc., 455 F.2d 668 (C.C. A. 8th, 1972) 6

Edmonson v. Farris, 263 Ark. 505, 565 S.W.2d 617 (1978) 13

Farley v. Jester, 257 Ark. 686, 560 S.W.2d 200 (1975) 12

Folk Construction Company v. Sun Pipe Line Company, 271 Ark. 836 (Ark. App. 1981) 19

Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed. 2d 556 (1972) 5

Garrett v. State, 187 Miss. 441, 193 So. 452 11

Harley v. Oliver, 400 F. Supp. 105 (1975) 12

Home Fire Insurance Co. v. Benton, 106 Ark. 552, 153 S.W. 830 (1913) 20

Jetton, et al. v. Fawcett, et al., 264 Ark. 69, 568 S.W.2d 42 (1978) 1, 5

Jordan Bierbaum v. City of Hamburg, 262 Ark. 532, 559 S.W.2d 20 (1977) 20

McMorella v. Greer, 211 Ark. 417, 200 S.W.2d 974 (1947) 6

Page

McSurley v. McClellan, 426 F.2d 664 (C.C. A., D.C. 1970) 6

Meyers v. State, 252 Ark. 367, 479 S.W.2d 238 (1972) 9

Narisi v. Narisi, 229 Ark. 1059, 320 S.W.2d 757 (1959) 11

Newhouse Mill Lumber Co. v. Keller, 103 Ark. 538, 146 S.W. 855 (1912) 5

Parker v. State, 271 Ark. 84, 607 S.W.2d 378 (1980) 6

Scott v. Cleveland, 110 Ark. 9 (1913) 4

State v. George, 250 Ark. 968, 470 S.W.2d 93 (1971) 13

United States v. Grinnell Corp., 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed. 2d 788 10

Walker v. Bishop, 408 F.2d 1378 7

Watts v. Cohn, 40 Ark. 114 (1882) 6

Constitution

UNITED STATES CONSTITUTION:

Fifth Amendment 2

Fourteenth Amendment 2

Statutes and Rules of Court

Page

Arkansas Statutes Annotated, Vol. 3 A, Sec. 27-1403, page 188 4

Arkansas Statutes Annotated, Vol. 3 A, page 512, Rules 4 and 5 5

Arkansas Statute 1947 Annotated (1979 Repl.), Vol. 3 A, Rules of Civil Procedure, No. 40 a. & b., pages 391-393 6

Arkansas Statute Annotated, Vol. 3A, (1947 Repl.), Rule 14(a) 1 & 2, Civil Procedure Circuit and Chancery Court Rules Appendix Rules of Court, page 516 17

Arkansas Statutes Annotated, Vol. 3 A, Rules of Court, Appendix, Rule 15, a. & b. page 345 19

Arkansas Statutes Annotated, 1947 (1962 Repl.), Sec. 22-404 page 73, Vol. 3 20

Arkansas Statutes Annotated, 1947, Sec. 22-301, page 26, Vol. 3 20

Other Authorities

21 A.L.R., Sections 2, 3 and 4 pp. 1370-1374 9

48 C.J.S., *Judges*, Sec. 82(c), p. 1062 11

48 C.J.S., Sec. 82, subsection C, p. 1061 ..... 9, 11

48 C.J.S., Sec. 82, subsection C, p. 1063 10

48 C.J.S., Sec. 82, subsection b, pp. 1058-1059 10

A.B.A., *Code of Judicial Conduct, Canon* 3 C 13

NO. 80-2216

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1980

JOHN W. JONES,

Petitioner,

VS.

R. L. FAWCETT AND WIFE, MILDRED FAWCETT, BUNN F. FAWCETT AND WIFE, JANICE FAWCETT,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE ARKANSAS COURT OF APPEALS

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

R. L. Fawcett and wife, Mildred Fawcett, and Bunn F. Fawcett and wife, Janice Fawcett, Respondents herein, pray that a Writ of Certiorari not be granted to review the judgment of the Arkansas Court of Appeals entered in the above entitled cause on April 8, 1981.

THE OPINIONS BELOW

Petitioners did not list the Opinion of the Arkansas Supreme Court in *Jetton v. Fawcett*, 264 Ark. 69 (1978).

However they have mentioned the same in their Statement of Facts, and it would appear that the case is essential to them, having made Otbie Jetton and Lula Bowles Talton, Plaintiffs, in their Amended Cause of Action, Argued here.

JURISDICTION

Petitioners have alleged that their jurisdictional requisites are adequate.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioners have cited the First Section of the Fourteenth Amendment to the Constitution of the United States, and the Fifth Amendment to the Constitution as being involved in this cause. Respondents do not find the same to be so involved.

STATEMENT OF THE CASE

Respondents adopt the statement of facts, of the above cause, as set out in the Opinion, of the Arkansas Court of Appeals, No. CA 80-459, opinion delivered by James R. Cooper, Judge, April 8, 1981. (Petitioner's Petition for a Writ, Appendix, A-1 - A-4 including second paragraph.) This is incorporated by reference, as it sets out the facts of the cause, without argument, in the opinion of Respondents.

ARGUMENT

REASONS FOR NOT GRANTING THE WRIT

I

THE TRIAL CHANCELLOR'S DENIAL OF PETITIONER'S MOTION FOR CONTINUANCE OF TRIAL DUE TO THE ABSENCE OF PLAINTIFF MARY ROGERS WILSON, DID NOT CONSTITUTE A DENIAL OF DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THEREFORE SHOULD NOT HAVE BEEN REVERSED BY THE ARKANSAS COURT OF APPEALS.

The only question presented here is whether or not the Trial Chancellor abused his discretion by refusing to continue this case. No Constitutional question is presented here. The State Appellate Court properly held there was no abuse of discretion which the Trial Chancellor exercised in this case.

It is interesting to note that in the trial of this cause on its merits, Attorney Maas, for Petitioners, stated before the Trial Court, that Mary Rogers Wilson no longer had any interest in the case, and there wasn't anything that she could testify to. (R. 663-664)

The undisputed record in this case points to the fact, that the intervention on behalf of Petitioners was filed on August 26, 1977, and that Petitioners made no move at all to bring the action to trial, until after Respondents filed their motion for a default judgment, on their counterclaim, on September 5, 1979, Petitioners' Petition for Writ, Appendix, A-2.

At a hearing on this motion on September 27, 1979, the Trial Chancellor set the cause down for trial in Little River County, Arkansas Chancery Court on December 20, 1979.

Petitioners made no move in writing for the continuance of the cause until December 17, 1979, despite the fact, that they knew that Mary Rogers Wilson was and had been an invalid for some time, was over 100 years of age, and in failing health. (R. 407-408)

Yet, they made no move to take the deposition of the witness. From the record, it would seem that, as they stated, "... so far I haven't seen anything that she could testify to."

In the affidavit for continuance by the physician, for Petitioners, there was no statement as to when the witness got sick, or how long she had been sick, or when, if ever, she would be able to travel, or to testify by deposition, or give testimony. *Scott v. Cleveland*, 110 Ark. 9 (1913).

Arkansas Statutes Annotated, Vol. 3 A, Section 27-1403, page 188, cited by Petitioners in their State Appellate Argument (Brief page 85), provides that to postpone a trial on account of the absence of evidence, the affidavit must show the materiality of the evidence expected to be obtained, due diligence to obtain it, what the absent witness will prove, and that the affiant believes it to be true.

There was no affidavit or evidence at all of what Mary Rogers Wilson, would have actually testified to. The only thing offered was a statement before the Court of an attorney for Petitioner that Mary Rogers Wilson was a material witness and would make an offer of proof that the record would reflect what their contention was — that there were certain deeds which were forged and a chain

of title containing some false and fraudulent forged deeds that the only person who could testify confidentially about these, was Mary Rogers Wilson. (R. 196-197)

They did not set out specifically what deeds were forged, when, or dates, or what relation the deeds would have to the outcome of the case. These statements before the court were mere allegations of what they sought to prove, not sworn to, and not specific.

Under Arkansas law, it is well settled that a motion for continuance which states conclusions and not facts, as to what a proposed witness, would testify to, is insufficient. *Newhouse Mill Lumber Co. v. Keller,* 103 Ark. 538, 146 S.W. 855 (1912).

Reasonable notice and an opportunity to be heard, as mentioned in *Fuentes v. Shevin,* 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed. 2d 556 (1972), was not violated by the Trial Chancellor, when referring to a certain portion of the transcript of proceedings of the testimony of the witness Mary Rogers Wilson, in *Jetton, et al. v. Fawcett, et al.,* 264 Ark. 69, 568 S.W.2d 42 (1978), with reference to facts therein, in the Motion for continuance hearing on December 17, 1979. Petitioners did not abstract the testimony or part thereof, of the original record in the State Appellate Court.

The Uniform Rules for Circuit and Chancery Courts, Volume 3 A, Ark. Statutes 1947 Annotated, page 512, Rule 4(a), states: Cases will be set at the request of any party after issues joined and a reasonable time has lapsed. . . . Rule 5, Settlements or Continuances, (b) After a case has been set for any purpose, no continuance will be granted, except for good cause shown.

The Rules of Civil Procedure of Arkansas, Rule 40, Trial Settings and Continuances, Vol. 3, Ark. Statutes, 1947 Annotated (1979 Replacement, pages 391-393), provide (a) Cases shall be set for trial at the request of any party after the issues have been joined. . . . (b) The court may, upon motion and for good cause shown, continue any case previously set for trial. . . . Reporter's notes to Rule 40 ". . . 3. FRCP sets no guidelines for determining when a continuance should be granted. The Federal Courts have taken the position that the matter of granting or refusing to grant a continuance rests in the discretion of the trial court." *McSurely v. McClellan*, 426 F.2d 664 (C.C.A. D.C. 1970); *Connell v. Steel Haulers, Inc.*, 455 F.2d 668 (C.C. A. 8th, 1972).

The matter of continuances is addressed to the sound judicial discretion of the Trial Court, and its action will not be reversed on appeal in the absence of such clear abuse of that discretion as to amount to a denial of justice. *Parker v. State*, 271 Ark. 84, 607 S.W.2d 378 (1980); *McMorella v. Greer*, 211 Ark. 417, 200 S.W.2d —— (1947); *Watts v. Cohn*, 40 Ark. 114 (1882).

When Petitioners neglected after September 27, 1979, until December 17, 1979 to ask for the continuance of the case, or the deposition of the witness, Mary Rogers Wilson — and having previously neglected the same by deposition, from August 26, 1977, until the said September 27, 1979, over two years — how now can the Petitioners complain that they were denied their constitutional rights for the failure of the trial court to continue this case?

II

THE TRIAL CHANCELLOR'S REFUSAL TO DISQUALIFY HIMSELF UPON PETITIONER'S MOTION FOR ALLEGED BIAS, PREJUDICE AND THE APPEARANCE OF IMPROPRIETY, DID NOT CONSTITUTE A DENIAL OF DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Here again the only question presented is whether or not the Trial Chancellor abused his discretion by refusing to recuse from the proceedings; which action was opposed by the Respondents, as a further delay in the cause by Petitioners, which had not been prosecuted by Petitioners in over two years after the filing thereof.

Certainly the Trial Judge has as much obligation not to recuse himself, when there is no occasion to do so, as there is to recuse himself when such an occasion exists. *Walker v. Bishop*, 408 F.2d 1378.

There is no presumption that a judge is disqualified, the burden being on the party asserting it to present facts showing such disqualification and the evidence must clearly show that a ground exists. *Bass v. Minich*, 194 Ark. 589 (1937).

The allegations of Petitioners were that John W. Jones, was a Defendant in a Little River County Arkansas Chancery Court case, in which Alma Duckett Hale was the Plaintiff, in cause No. E-78-101, and that on February 22, 1979, the Trial Chancellor, in a hearing, cancelled certain deeds in favor of the Plaintiff, against the Defendant.

Thereafter and on September 27, 1979, in a Motion for

a new trial, Petitioners alleged that one of their then attorneys, Mr. Boyd Tackett, made the statement that the Trial Chancellor almost held John W. Jones in contempt of Court, during the trial of the *Hale v. Jones* case, supra, on its merits on the said February 22, 1979.

In the motions for a New Trial filed by Petitioners on December 6, and December 17, 1979, Mr. Boyd Tackett (who was not even an attorney in the case on the trial of the merits but who later filed the first motion for a new trial, on May 1, 1979) stated that it must have been a court reporter, who told him, that the Trial Chancellor almost held John W. Jones in contempt, as the Trial Chancellor never talked with him about the merits of a case in his life. (R. 333-334) Petitioners' Petition for Writ, Appendix A-7.

The Trial Chancellor in his Memorandum Opinion denied that he had ever made any statement to Mr. Boyd Tackett or anyone else, that he almost held John W. Jones in Contempt. Petitioners' Petition for Writ, Appendix A-34.

Petitioners also sought to prove discrimination by the Trial Chancellor in granting a default judgment on the Motion for a New Trial granted against Petitioner, when Mr. Boyd Tackett did not appear to prosecute his Motion for a new trial. Petitioners' Petition for Writ, Appendix A-36.

It is highly significant here that the Trial Chancellor did give a complete new trial to Petitioners on their Motion for a New Trial, and to their new attorneys on September 27, 1979, and the Trial Chancellor commented in the evidence of the hearing, that if there was any misunderstanding on the previous hearing, then he was going to rectify

that. (R. 312) The result of this hearing was again to deny a new trial in the *Hale-Jones* case, supra, to Petitioners.

It is important to note here also that Petitioners did not appeal the *Hale-Jones* case, Little River Chancery No. E-78-101. Neither did they enter into the record of the case any happenings, remarks or evidence of any nature, that the Trial Chancellor was harsh, inconsiderate, biased or prejudiced against Petitioner. Don't you know that if there had been any evidence of unfairness to John W. Jones, in the trial of that case, that Petitioner would have had such evidence before the Appellate Court on review?

Even the Petitioners have not charged that the Trial Chancellor was disqualified from hearing the Jones v. Fawcett, CA 80-459, case, because of having previously heard *Hale v. Jones*, supra, and bias or prejudice must be found. 21 A.L.R., Sections 2, 3 and 4 pages 1370-1374.

A previous ruling of a judge although erroneous does not disqualify him. 48 C.J.S., Sec. 82, Subsection C, page 1061.

In Arkansas even in a criminal case, the judge was held not to be disqualified where a defendant sought post-conviction relief, after the judge had previously sentenced him in a case, and the defendant sought assignment of the case to another judge. It was held in *Meyers v. State*, 252 Ark. 367, 479 S.W.2d 238 (1972) that he was not entitled to another judge, where the sentencing judge had not violated the defendant's constitutional rights, and the record did not show that defendant has been treated unfairly.

A judge is not disqualified from sitting in contempt proceedings merely by reason of the fact that the contempt took place before him, or that it was based on imputations

as to such judge's motive or his integrity, 48 C.J.S., Sec. 82, page 1063 C.

"Bias or prejudice of a judge to disqualify him must be an actual bias or character calculated to sway his judgment seriously and generally must be directed against a party to the cause, and must arise other than from the judicial proceedings before him. Only a personal prejudice for or against the party will serve as disqualification." 48 C.J.S., Sec. b., pages 1058-1059.

"To be disqualified, the alleged bias and prejudice of a judge must stem from an extra-judicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States v. Grinnell Corp.*, 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed. 2d 788.

Petitioners make much of the candor of the Trial Chancellor in his Memorandum Opinion which stated, ". . . that he had a *friendly relationship* with Bunn F. Fawcett and wife Janice Fawcett and that he does not know any of the Plaintiffs in this case. . . ." (Italics ours) Petitioners' Petition for Writ, A-35.

Now let us examine Petitioners' Petition for Writ, Statement of the Case, page 5, as follows: "The Memorandum Opinion of December 20, 1979, further discloses that the Trial Chancellor had *a close personal friendship with the defendants.*" (Italics ours)

Then again in Petitioners' Petition for a Writ, Argument, page 14, it was stated, ". . . Memorandum Opinion . . . indicated that the Trial Chancellor had *a personal friendship with two of defendants* . . . Bunn F. Fawcett and Janice Fawcett." (Italics ours)

We submit that Petitioners' allegations are incorrect, the same not being in conformity with the proof in this case, and we invite this Honorable Court to a full reading of this Memorandum Opinion, as to the fairness and impartiality of the Trial Chancellor in fulfilling the duties of his office, in this cause.

Certainly a judge is not disqualified from presiding merely because he is more friendly with one of the litigants than the other. *Garrett v. State,* 187 Miss. 441, 193 So. 452; 48 C.J.S., *Judges,* Sec. 82(c), page 1062. Nor merely because of his having set in trial of a defendant on previous occasions, 48 C.J.S., Sec. 82(c), page 1061.

It is well settled that matters of disqualification of the trial judge rest largely in the discretion of the trial judge himself.

"Appellant insisted that the Trial Judge should have disqualified himself because he had formerly been somewhat closely associated with Appellee, both socially and in a business way. We point out that no showing was made which would disqualify the Trial Judge under any Statute or under the Constitution of the State. Such matters of disqualification are, as we have said many times, left largely to the discretion of the trial judge, himself. We cannot say that the Trial Judge abused his discretion in this instance. . . ." *Narisi v. Narisi,* 229 Ark. 1059, 320 S.W. 2d 757 (1959).

Neither the fact that the District Judge may have personally known one defendant who, himself was a judge, nor former's statement that he had the utmost confidence in the latter warranted disqualification of the District Judge

on the ground of bias or prejudice. *Harley v. Oliver*, 400 F. Sup. 105 (1975).

Merely because a trial judge in prior judicial action has found it necessary to cite a party for contempt, does not automatically or inferentially raise issue of bias. *Barry v. Sigler*, C.A. Neb. 373 F.2d 835 (1967).

Petitioners have cited the case of *Farley v. Jester*, 257 Ark. 686, 560 S.W.2d 200 (1975) with reference to the friendship of the Trial Judge with a witness. That case is readily distinguishable from the case at bar in the following particulars:

(1) In that case the trial Court went off the record for some phase of the testimony, and the Arkansas Supreme Court held this was not permissible and reversed and remanded the same.

(2) It was further brought out therein, that the Chancellor had said, that he was closely connected with the witness, Park, and that if he had known that Park was going to be a witness he would have excused himself, and that whatever Park testified to would be the findings of the court. The Chancellor stated that he did not say that, what Mr. Park testified to, would be the verdict of the court, or did not remember saying it. He stated that what Park said would not dictate what the court determined, though it may have outweighed some of the other testimony.

The Arkansas Supreme Court further commented: "Of course, if the court's relationship with a witness is such that he would, with advance knowledge that that person would testify, recuse himself — then — the matter becomes

very simple — he is disqualified, and should so announce when he learns that that person will be a witness."

Petitioners have further cited *Braswell v. Gehl,* 263 Ark. 706, 567 S.W.2d 113, (1978), and will no doubt in their reply brief, again cite to this Court, cases previously mentioned in the Arkansas Court of Appeals, of *Edmonson v. Farris,* 263 Ark. 505, 565 S.W.2d 617 (1978), and *State v. George,* 250 Ark. 968, 470 S.W.2d 93 (1971).

They are cited by Petitioners with reference to Canon 3-C of the Code, of the American Bar Association Code of Judicial Conduct, as stated, being adopted by the Supreme Court of the State of Arkansas, on October 12, 1973, to the effect that a judge should disqualify himself in any proceedings in which his impartiality might reasonably be questioned.

In the *Gehl* case, supra, the trial judge was the father-in-law of the Appellee's attorney.

To the same effect was the *Farris* case, supra, in which the Court gave a warning (although deciding the case on other grounds), that the trial court should disqualify himself upon his own motion, if his son was the lawyer, representing the Appellee.

In the *George* case, the regularly presiding trial judge was disqualified, and selected the judge for exchange, and the Arkansas Supreme Court held that to be a proceeding in which the regular presiding judge was interested, where the disqualification resulted because the proceedings would affect individual rights of the presiding judge.

Certainly these cases are those in which the impartiality of a judge might reasonably be questioned, if he heard

the case as a relative or had an interest in same. None of these facts, are present in the case at bar.

If the Trial Chancellor in the instant case, had been related, or had been interested in some particular in the cause, then of course, the proceedings would appear to be unfair and partial, and he would have been expected to recuse himself, on his own motion. Such however were not the facts in the case at bar.

The Trial Chancellor stated that he could give a fair and impartial trial to all litigants, before his court, and that otherwise, he would not be worthy to be a Chancellor.

In a small district such as his in Southwest Arkansas, certainly he is on friendly terms with a large part of his constitutency, and it is evident that he cannot disqualify himself, everytime a question of this nature arises. Petitioners' Petition for Writ, Appendix A-36.

Neither the law nor the Code of Judicial Conduct requires this. The entitlement is not one of a friendly or unfriendly judge to litigants, but one who can lay aside all interests, and decide without bias or prejudice, under the facts and the law in the cause. The Trial Chancellor said that he could do this, and the Arkansas Court of Appeals found that he did do so.

There was a judicial discretion vested in the Trial Chancellor as to whether or not, he would try the case at bar. The State Appellate Court on appeal decided that he did not abuse that discretion by deciding the case. Petitioners' Petition for Writ, Appendix A-6-7.

Further, on the merits of the case, the Court found that Respondents would prevail under their Color of Title, and

adverse possession of the said alleged life Estate of Mary Rogers Wilson, to an undivided one-half lifetime interest in 160 acres of land in Little River County, Arkansas, and quieted title in Respondents. Petitioners' Petition for Writ, Appendix A-11. The evidence of the violation of the Fifth and the Fourteenth Amendments to the United States Constitution are simply not present in the case at bar.

Certainly the appearance of impropriety to a fair minded litigant or to a truly disinterested outsider, in observing the trial and actions of the Trial Chancellor would not be evident in the trial and record, and manifestations of patience, fairness and impartiality exhibited by the judge would dominate.

It is true that to an interested party, as petitioner, he might not think so, in his advocacy of his particular side of the facts. However we think the test of such appearance of impropriety, should not be measured entirely by the partiality of the parties, but to the impartiality evidenced by the Tribunal, in dealing with the many procedures and questions coming before him. And this could best be evidenced through the eyes and mind of a fair-minded litigant and a disinterested, preferably a previously uninformed person, on the subject matter.

There was no evidence of the badgering of Mr. Tackett by the Trial Chancellor. It was not established that the Trial Chancellor ever made any statement at all with reference to Petitioner, and there was no evidence against the Trial Chancellor of bias or prejudice in recalling Sheriff Thrash, as it was necessary to inquire of the sheriff as to what actions he had taken in the case. Petitioners' Petition for Writ, Appendix A-8.

Petitioners further allege bias and prejudice and appearance of impropriety, in violation of the Fifth and Fourteenth Amendments to the United States Constitution by the Trial Chancellor's failure to consider the opening trial brief, because the same was not filed at 9:00 a.m., January 9, 1980, when due.

The Trial Chancellor gave Petitioner two additional days to file his brief, or on January 9, 1980, and the brief was filed at 9:00 a.m., on January 10, 1980. He had earlier indicated that he would not consider briefs not filed as scheduled.

The Arkansas Court of Appeals found no prejudice or abuse of discretion by the Trial Chancellor in failing to consider the first brief. Petitioners were allowed to file their Reply Brief in accordance with the original schedule and were able to reply point by point to matters raised by Respondents and to include their closing argument in that brief. Petitioners' Petition for Writ, Appendix A-16.

We submit that the Trial Chancellor was fair to both parties, and that there has been no denial of due process of law. The Trial Chancellor had a right to be in control of the Administration of his Court and to make the schedule for the procedure of Argument before the Court. He must be able to enforce the rules for the orderly transaction of the business before the Court.

a. The total time for all parties to file briefs in any case in the Circuit, Chancery and Probate Courts is limited to a period of not to exceed 30 days after trial is completed and the case ready for decision.

(1) The time for filing briefs may be extended, re-

duced or eliminated in any particular case in the discretion of the trial judge.

(2) The time allocated by the trial judge for filing briefs shall be apportioned among the various parties as directed by the trial judge. . . .

Volume 3 A, Arkansas Statutes Annotated (1979 Replacement) Circuit and Chancery Rule 14, Appendix, Rules of Court, page 516.

This matter was within the discretion of the Trial Chancellor to handle and we submit that he did not abuse that discretion.

III

THE TRIAL CHANCELLOR'S DENIAL OF PETITIONERS' MOTION TO FILE AN AMENDED COMPLAINT BASED ON 42 U.S.C. 1985(3) AND HIS DENIAL OF A REQUEST TO CALL WITNESSES IN SUPPORT THEREOF DID NOT CONSTITUTE A DENIAL OF DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

It is not denied in this case that the testimony was closed and that both sides rested their case on December 21, 1979, subject only to the taking by the Petitioners of the deposition of their witness, Martha Edmonson. (R. 760) The deposition was taken on January 3, 1980. Motion to file the Amended Complaint was made and filed on January 7, 1980. (R. 85-87) This suit asked for $1,000,000.00 damages and was filed under the Civil Rights Act, and asked for a jury trial. Otbie Jetton and Lula Bowles Talton were named as additional party Plaintiffs. It should be noted that under

the agreed stipulation with Petitioners' attorney at the trial of the merits of this cause on December 20, 1979, that the rights of Otbie Jetton and Lula Bowles Talton were concluded by the decision in *Jetton v. Fawcett,* supra.

Nevertheless, Petitioners prevailed on the Trial Chancellor to amend the Complaint on January 8, 1980, but the request was denied. Petitioners had intervened on August 26, 1977, in the original suit which began on July 25, 1975. Respondents filed a counterclaim on a Suit to Quiet Title to lands in the cause. Petitioners sought to introduce testimony of the death of one Cubie Boyd, allegedly by a brother of Respondents in the early 1940's to show a climate of fear among the older black people against Respondents and a conspiracy to prevent Petitioners from assertion of their rights in the subject land and that Respondents were responsible therefor.

Petitioners sought to use as a witness, the widow of the deceased Cubie Boyd to tell of the murder of Cubie Boyd, and did not bother to check the records at the local courthouse to determine the outcome of the case.

Petitioners also seek in their Argument at page 16, Petitioners' Petition for Writ, to infer that Respondents inflicted acts of terrorism on the property and that Otbie Jetton was told by the sheriff not to go back on the subject property. There is no proof that Respondents were guilty of any act of terriorism, and there is convincing proof that since 1950 Respondents have been the exclusive owners and in possession of the said 160 acres of land, and that Petitioners have not ever been in the possession or ownership of the same.

Petitioners also allege therein that Plaintiff Lula

Bowles Talton signed a document which she did not know the contents of under an implied threat of death by the Defendant, R. L. Fawcett. Petitioners know that there was no threat or implied threat of death, ever made to Lula Bowles Talton, and the record does not reflect it.

Further, the document they refer to must have been the Warranty Deed which Respondents went in possession under in 1950, and Lula Bowles Talton had been out of the ownership and possession of the said premises, for over the past 30 years.

Rule 15, Rules of Civil Procedure, Appendix — Rules of Court, Vol. 3 A, page 345, Arkansas Annotated (1979 Replacement), provides: (a) A party may amend his pleadings at any time without leave of the Court. Where, however upon motion of an opposing party, the Court determines that prejudice would result or the disposition of the cause unduly delayed because of the filing of an amendment, the court may strike such amended pleading or grant a continuance of the proceedings. . . . (b) . . . If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the Court may allow the pleadings to be amended in its discretion. At Appendix A-13 and A-14, Petitioners' Petition for Writ, the Arkansas Court of Appeals takes up this issue, stating that the rule allows the amendment of pleadings to conform to the proof, the purpose of the rule is not to allow the insertion of new claims for relief following trial of a cause of action, but to conform to pleadings of proof adduced at trial. Further, that Petitioners were seeking to inject new matters of proof, and in fact, new parties to the action.

Also that it is within the sound discretion of the trial court to allow or refuse amendments to pleadings. *Folk*

Construction Company v. Sun Pipe Line Company, 271 Ark. 836 (Ark. App. 1981). That court found no abuse of discretion in this cause, and therefore it was not necessary to consider whether or not a Civil Rights claim could be raised in Chancery, or that it was an abuse of discretion and a denial of due process to deny Petitioners the right to call witnesses, in support of their motion for leave to file an amended complaint.

Respondents submit, however, that Petitioners could not raise the issue and file a Civil Rights suit for damages, in the Little River County, Arkansas Chancery Court, after all parties had rested their case, and to bring in new issues and new parties and ask for a jury trial, in said Court.

If they desired to file a civil suit for damages, or because of some wrong allegedly done to them, it would be necessary for them to file a suit in the Little River County, Arkansas Circuit Court, since they demanded a jury trial.

Arkansas Statutes Annotated, 1947 (1962 Replacement), Section 22-404, provides that Chancery Courts shall have original jurisdiction of all matters in Equity. Also, that Equity has no jurisdiction where there is a remedy at law. *Home Fire Insurance Co. v. Benton*, 106 Ark. 552, 153 S.W. 830 (1913).

Arkansas Statutes Annotated, Section 22-301, states that Circuit Courts shall have original jurisdiction of all actions and proceedings for the enforcement of civil rights, or redress of civil wrongs, except when exclusive jurisdiction is given to other Courts.

Petitioners in the State Appellate Court, cited *Jordan Bierbaum v. City of Hamburg*, 262 Ark. 532, 559 S.W.2d 20 (1977), as authority for the right to prosecute the instant

action amendment in Equity under the clean-up doctrine. That case is distinguishable from the case at bar in the following instances: (1) The landowner himself filed the suit in Chancery for damages for condemnation. (2) Also the condemning authority, the City, asked the Court to condemn the land and to assess the damages. (3) There was no objection by the landowner to the assessment of damages, and he did not ask for a jury trial.

In the case at bar, damages, are asked for and a jury trial demanded by Petitioners. Respondents also objected to the trial of the issues of the amended complaint in the Chancery Court.

Therefore, Respondents state it was too late on January 7, 1980 for Petitioners to file a Civil Rights Action in the Chancery Court, on an Intervention in a Suit to Quiet Title to land, if, indeed, one could have been filed in the first place. However, it was not too late then, and may not be too late now possibly for them to file such a suit in the Little River County, Arkansas Circuit Court. Of course that is for the Courts to interpret when and if such action be filed. Suffice it to say that no such action would now seem valid, we submit, either under State or Federal law, in the Chancery Court as Petitioners seek to acquire by amendment.

Petitioners state in their Petition for Writ, page 17, third paragraph, that the refusal of the Trial Chancellor to allow them to call witnesses on their amended complaint was a denial of due process, in that it was an act that might forever bar the Civil Rights claims of petitioners without an opportunity to be heard.

Attorneys for Petitioners made offer of proof, as to

what the witnesses would testify to and the Trial Chancellor had the right and duty to exclude the proffered evidence, as being nonrelevant to the case and issues involved, in addition to all of the other objections that were made to the filing of the amended complaint.

As the Trial Chancellor so aptly stated at the time, that he had heard a suit to quiet title to land upon which he was to make his decision, and he could not go back and try a murder case, an alleged murder case, that happened in the 1940's.

It is significant to note that in Petitioners' Petition for Writ, page 6, second paragraph, that they filed a Petition with the Arkansas Supreme Court on February 14, 1980, seeking a permanent injunction to prevent the Trial Chancellor from rendering a decision, and to ask for a transfer of all proceedings to the United States District Court, Western District of Arkansas, Texarkana Division, "*where a companion action had been filed arising out of the same alleged Civil Rights violations.*" (Italics ours)

Thus it is shown that in addition to this State Action on Civil Rights issue before this Court, Petitioners also have a companion action thereon that has been filed in the Western District of Arkansas, Texarkana Division, since before February 14, 1980, so it would appear that they should not fear that their Civil Rights Action might be forever barred or that such witnesses as they desired to call might not have an opportunity to be heard in the Federal Court, as well as in the State Circuit Court as previously mentioned.

Surely when attorneys for Petitioners presented to the Trial Chancellor the substance of what the testimony

would be by the witnesses, and the purposes of the same, he had the right and the duty to exclude the same, if it was not relevant or material to the case and issues at bar.

Thus, if it appeared to Petitioner that the Trial Chancellor was biased or prejudiced against him, because he did not admit into evidence in a Chancery Action to quiet title to property, in 1979, to wit:

Alleged testimony concerning the murder of one not connected with the case, by another, also not a party to the action, which murder occurred in 1941, the same is not a gauge to measure impropriety, bias or prejudice, even though in the eyes of Petitioner, the failure to admit the testimony of an alleged witness to the murder might cause him to believe the judge was prejudiced.

The Court is under a duty to stay within the realm of legal procedure for all parties, and not to go off on tangents wholly unrelated to the subject matter of the trial proceedings.

We submit, therefore, that in any event, under the facts and law in this cause, the Trial Chancellor did not abuse his discretion in refusing to allow the amendment to the Complaint of the Petitioners, nor in failure to allow the testimony, of the Petitioners' witnesses thereto.

The Trial Court had the right and the duty to conclude this case after both parties had rested, and to refuse to allow irrelevant and immaterial testimony in the cause which was offered by Petitioners, too late and in the wrong tribunal, and on behalf of parties and issues, which have long since been excluded by Courts of competent jurisdiction in this cause.

CONCLUSION

Respondents submit that all of the Reasons for granting the Writ of Certiorari to the Arkansas Court of Appeals as set out in the Petition for Writ by Petitioners are questions in which the discretion of the Trial Chancellor were involved and that such discretion exercised by the Trial Chancellor was fair and proper, the order of the Arkansas Court of Appeals on review, so finding.

Therefore, since there does not appear to be any bias, prejudice, or discrimination, nor a Federal Question involving the violation of the Fifth or the Fourteenth Amendments to the Constitution of the United States, in this cause, it is further submitted that there is nothing which would call for a review by this Honorable Court of the issues involved, which have not already been validly decided by the Arkansas State Court on Appeal.

Wherefore, Respondents pray that the Writ of Certiorari be, by this Honorable Court, denied to Petitioners, and all relief, entitled herein.

Dated: July 22, 1981.

Respectfully submitted,

JOHN C. FINLEY, JR.
Counsel of Record
JOHN C. FINLEY III

FINLEY & FINLEY
Attorneys at Law
20 E. Main St.
Ashdown, Arkansas 71822
Telephone (501) 898-3147

Attorneys for Respondents